Balakerisnan a/l Varathan & Anor v Muniandy a/l Varathan & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S3–24–2803 OF 2001
MOHD HISHAMUDIN J
18 MAY 2004

Civil Procedure — Ex parte application — Appointment as executors and trustees — Order to set aside — Non disclosure of material facts leading to application of ex parte order

Mr Varathan a/l Thandavarayan died on 16 April 1994 in Kuala Lumpur, leaving a will ('the will'). Under the will, he bequeathed his land in the Mukim of Batu, Kuala Lumpur ('the land') to his nine children in equal shares. This was an application by the defendants to set aside an *ex parte* order obtained by the plaintiffs. The *ex parte* order empowered the plaintiffs, as executors and trustees under the will, to sell the land, bequeathed to the beneficiaries under the will.

Held, allowing the application:

(1) In making the *ex parte* application, the plaintiffs should have made full and frank disclosure. The plaintiffs failed to make full and frank disclosure of all facts which were material in order for the court to make a fair decision as to whether or not the *ex parte* application ought to have been granted. The plaintiffs as executors and trustees were under both legal and moral obligations to place the whole facts before the court. Had the court been informed of the materials facts, it might not have granted the *ex parte* application (see para 39).

(2) The plaintiffs' affidavit did not contain the requirements of O 41 r 1(4) of the Rules of the High Court 1980 ('the RHC') in that it did not state the place of residence (or any address at all) of the deponent and it did not state whether the deponent affirmed or took an oath (see para 41). The defects in the plaintiffs' affidavit were serious in nature and were fundamental. The affidavit, therefore, must was rejected (see para 50).

(3) The validity of the plaintiffs' affidavit could not be saved by resorting to O 1A and O 2 r 3 of the RHC. The purpose behind the introduction of O 1A and O 2 r 3 of the RHC was not to protect the indolent or cavalier litigants, but to afford protection to the ordinary rule-abiding litigants in a situation where the non-compliance was due to mere genuine inadvertence or oversight (and not blatant disregard) and non-prejudicial in nature; or where the non-compliance was not serious or fundamental in nature. The court has the solemn duty to ensure respect for the rules of procedure as enshrined in the RHC (see para 57).

(4) In the present case, in the light of the fundamental nature of the defects in the plaintiffs' affidavit, it would be highly prejudicial and a gross injustice to the defendants if the plaintiffs' affidavit was allowed to stand. For then, the court would be bending extensively the rules of procedure just to accommodate a litigant that had treated the rules of procedure with gross carelessness. This would not be fair to the defendants who had painstakingly and diligently adhered by the rules. Furthermore, the conduct of the plaintiffs vis-a-vis the defects must also be taken into account. It cannot be said that they were unaware of the defects. They had been forewarned of the defects in the affidavit by the defendants' affidavit. But the plaintiffs were adamant; they took no prompt action to rectify the defects. And when the plaintiff eventually did file a so-called corrective affidavit, it was not only a much belated effort but also a halfhearted measure (see para 57).

[**Bahasa Malaysia summary**

En Varathan a/l Thandavarayan telah meninggal dunia pada 16 April 1994 diKuala Lumpur dan meninggalkan satu wasiat ('wasiat itu'). Di bawah wasiat itu, beliau telah mewariskan tanah beliau di Mukim of Batu, Kuala Lumpur ('tanah itu') kepada sembilan anak-anaknya dengan bahagian sama rata. Ini adalah permohonan oleh defendan-defendan untuk mengetepikan perintah *ex parte* yang diperolehi oleh plaintif-plaintif, sebagai wasi dan pemegang amanah di bawah wasiat itu, untuk menjual tanah itu, yang diwariskan kepada benefisiari di bawah wasiat itu.

Diputuskan, membenarkan permohonan itu:

(1) Dalam membuat permohonan *ex parte* itu, plaintif-plaintif sepatutnya membuat pendedahan penuh dan jujur. Plaintif-plaintif gagal untuk membuat pendedahan penuh dan jujur semua fakta-fakta material supaya mahkamah dapat membuat keputusan yang adil mengenai sama ada permohonan *ex parte* itu sepatutnya dibenarkan. Plaintif-plaintif sebagai wasi dan pemegang amanah mempunyai tanggungjawab undang-undang dan moral untuk meletakkan semua fakta-fakta di hadapan mahkamah. Sekiranya mahkamah dimaklumkan mengenai semua fakta-fakta material, kemungkinan adalah mahkamah tidak akan membenarkan permohonan *ex parte* itu (lihat perenggan 39).

(2) Afidavit plaintif tidak mengandungi keperluan A 41 k 1(4) Kaedah-Kedah Mahkamah Tinggi 1980 ('KMT') di mana ia tidak menyatakan tempat tinggal (atau sebarang alamat pun) deponen dan tidak menyatakan sama ada deponen telah berikrar atau mengambil sumpah (lihat perenggan 41). Kesilapan dalam afidavit plaintif-plaintif adalah bersifat serius dan adalah kesilapan asas. Oleh itu, afidavit itu mesti ditolak (lihat perenggan 50).

(3) Kesahan afidavit plaintif-plaintif tidak boleh diselamatkan dengan bergantung kepada A 1A dan A 2 k 3 KMT. Tujuan di belakang pengenalan A 1A dan A 2 k 3 KMT bukan untuk melindungi seorang litigan yang berat tulang atau angkuh, tetapi untuk memberi perlindungan kepada seorang litigan biasa yang mematuhi undang-undang di dalam situasi di mana ketidakpatuhan adalah kerana satu kesilapan yang benar dan jujur (dan bukan tidak mempedulikan secara terang-terangan) dan dalam sifat tidak berprejudis; atau di mana ketidakpatuhan itu tidak serius atau bersifat asas. Mahkamah mempunyai tanggungjawab untuk memastikan terdapat penghormatan terhadap rukun-rukun prosedur yang termaktub dalam KMT (lihat perenggan 57).

(4) Dalam kes ini, oleh kerana kesilapan dalam afidavit plaintif-plaintif adalah bersifat asas, ia adalah berprejudis dan tidak adil kepada defendan-defendan sekiranya afidavit plaintif-plaintif dibenarkan. Ini adalah kerana, mahkamah akan dianggap tidak menghiraukan rukun-rukun prosedur untuk membantu litigan yang berkelakuan cuai terhadap rukun-rukun prosedur. Ini adalah tidak adil terhadap defendan-defendan yang telah mematuhi rukun-rukun itu. Lagipun, kelakuan plaintif-plaintif vis-à-vis kesilapan itu juga mesti diambil kira. Ia tidak boleh dikatakan bahawa mereka tidak sedar bahawa adanya kesilapan. Mereka telah pun diberi amaran bahawa terdapat kesilapan di dalam afidavit mereka dalam afidavit defendan. Tetapi plaintif-plaintif bersifat tidak peduli, mereka tidak mengambil tindakan dengan cepat untuk membetulkan kesilapan itu. Dan apabila plaintif memfailkan afidavit yang dianggap betul, ia bukan sahaja satu tindakan yang sudah lewat tetapi juga satu langkah yang tidak dengan sepenuh hati (lihat perenggan 57).]

Notes

For cases on *ex parte* application generally, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2354–2356.

Cases referred to

Allen v Taylor (1870) LR 10 Eq 52 (refd)
Doe d Britton v Clarke (1842) 12 LJQB 69 (refd)
Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd [1988] 3 All ER (refd)
Newton, Re (1860) 2 De GF & J 3 (refd)
Ng Hee Thong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Oliver v Price (1834) 2 Dowl 261 (refd)
Phillips v Prentice (1843) 2 HARE 542 (refd)

Legislation referred to

Probate and Administration Act 1959 s 60(3)
Rules of the High Court 1980 O 1A, O 2 r 3, O 41 r 1(4)

A *S Saravanan (Saravanan) for the plaintiffs.*
T Gunaseelan (Balakrishnan with him) (Bala Naido & Partners) for the defendants.

Mohd Hishamudin J:

B **[1]** The *inter parte* summons in chambers at encl 31 is an application by thedefendants to set aside an *ex parte* order obtained by the plaintiffs on 16October 2001.

[2] The *ex parte* order empowered the plaintiffs, as executors and trustees under a will, to sell a piece of land, bequeathed to the beneficiaries under the C will, to a company known as Bright Rims Manufactured Sdn Bhd.

[3] The defendants opposed the intended sale.

[4] I have allowed the defendants' application to set aside the ex parte order with costs.

D

[5] My grounds are as follows.

[6] Mr Varathan a/l Thandavarayan died on 16 April 1994 in Kuala Lumpur, leaving a will. Under the will he bequeathed his land in the Mukim of Batu, Kuala Lumpur, to his nine children in equal shares in the following manner:

E

(1)	Neela a/p Varathan	1/9 share
(2)	Ganasan a/l Varathan	1/9 share
(3)	Muniandy a/l Varathan	1/9 share
(4)	Letchumy a/p Varathan	1/9 share
(5)	Muruguss a/l Varathan	1/9 share
(6)	Saraswathy a/p Varathan	1/9 share
(7)	Sivagamy a/p Varathan	1/9 share
(8)	Balakerisnan a/l Varathan	1/9 share
(9)	Lokanadan a/l Varathan	1/9 share

F

G

[7] In the will, he named his daughter, Saraswathy (beneficiary No 6 above), and his son, Balakerisnan (beneficiary No 8 above), as the executors and trustees of the will.

H

[8] It is expressly stated in the will that the land was bequeathed to his nine aforesaid children:

> ... for their absolute use and benefit during their life ...

I **[9]** Subsequent to the death of Mr Varathan, the two executors (Saraswathy and Balakerisnan) of the will applied for and were issued by the High Court with a grant of probate on 2 May 1995.

[10] And on 3 May 1996 Saraswathy and Balakerisnan had their names registered on the title of the land as the personal representatives of the deceased Varathan.

[11] The executors, however, took no steps to transfer the property to the names of the beneficiaries.

[12] Instead, what appears to have happened was, on 7 April 2000 (that is to say, some five years after the grant of probate), all the beneficiaries under the will, except Muniandy, signed a 'statutory declaration' authorising the plaintiffs/executors to sell the property to 'any interested party'. No mention, however, is made in the statutory declaration of the selling price. The circumstances under which Neela signed the statutory declaration are set out in para 8 of her affidavit affirmed on 19 December 2003 (encl 30A), and that paragraph states as follows:

> 8 Selepas beberapa permintaan dan desakan ke atas saya, plaintif pertama dan kedua datang ke rumah saya pada awal tahun 2001, dan lelah memberitahu saya bahawa mereka dalam proses untuk memindahmilik hartanah HS (M) 710 PT No 9640 Mukim Batu, Daerah Kuala Lumpur Negeri Selangor sama rata 1/9 bahagian setiap seorang kepada semua benefisiari-benefisiari yang dinamakan dalam wasiat simati tersebut. Alas dorongan plaintif pertama dan kedua saya telah dibawa ke satu pejabat peguam dan justeru itu dengan penuh kepercayaan pada kata-kata plaintif pertama dan kedua saya telah menandatangani satu dokumen yang telah dikemukakan kepada saya oleh plaintif pertama dank.
>
> 9 Saya tidak menerima sebarang dokumen daripada plaintif pertama dan kedua berkenaan dengan pindahmilik. Malangnya saya diberitahu oleh saudara-mara bahawa plaintif pertama dan kedua tersebut telah menandatangani satu perjanjian jual beli dengan pihak ketiga untuk menjualkan hartanah HS (M) 710 PT No 9640 Mukim Batu, Daerah Kuala Lumpur Negeri Selangor.

[13] On 11 June 2001, two of the beneficiaries, Muniandy and Neela (who subsequently became the first and second defendants in the present action), suspecting that something was amiss, sought legal advice from a firm of solicitors, M/s Daim and Gamany. And these two beneficiaries were advised to protect their rights over the said land by lodging a private caveat, which they did. The reason for lodging the caveat, as stated in the caveat, is as follows:

> Kami adalah waris kepada harta pesaka simati (Varathan a/l Thandavarayan) melalui pemberian probat bertarikh 28 Mac 1995 di Mahkamah Tinggi Malaya Seremban melalui No Probet 32–175–1994. Pemegang amanah enggan memindahmilik harta simati yang tersebut dalam jadual di bawah ini kepada kami. Dengan ini kami memasukkan kaveat persendirian ini untuk melindungi segala hak kepentingan kami.

[14] As a follow-up action, on 13 June 2001, M/s Daim and Gamany, the solicitors for Muniandy and Neela, wrote to the plaintiffs/executors alleging

A that the two executors had induced Neela to sign the statutory declaration by falsely representing to her that the executors would transfer the property to all the beneficiaries as per the will of the deceased.

[15] The solicitors, in their letter, also demanded that the plaintiffs/executors to take the necessary step to transfer to Muniandy and Neela their respective shares in the land within seven days.

[16] On 28 June 2001, M/s Saravanan, solicitors for the plaintiffs/executors, replied to M/s Daim and Gamany denying that there was any false representation on the part of their clients; and requested more time for the executors to:

> exercise their power, duties and discretion under the will as they deem fit.

[17] It is not clear what the plaintiffs' solicitors meant by:

> ... exercise their power, duties and discretion under the will as they deem fit.

[18] However, the plaintiffs' solicitors never gave any indication that the plaintiffs intended to sell the land to a third party.

[19] In response, on 10 July 2001, M/s Daim and Gamany wrote to M/s Saravanan extending the period of seven days to 14 days for the plaintiffs/executors to take the necessary steps to effect registration of the respective shares of Neela and Muniandy on the title. M/s Daim and Gamany also gave notice that, should the plaintiffs fail to take the necessary steps to effect the transfer within 14 days, legal action would be instituted against them.

[20] The plaintiffs, however, ignored the warning. Instead of taking steps to effect the transfer of the respective shares of the beneficiaries in the land to the beneficiaries, the plaintiffs, on 11 August 2001, without notifying Neela or Muniandy or Messrs Daim and Gamany, filed an *ex parte* origination summons, that is, the present originating summons, seeking an order of the court to authorise the plaintiffs/executors to sell the land in question to the said company, Bright Rims Manufacturer, for RM1,250,000.

[21] The application was made pursuant to sub-s (3) of s 60 of the Probate and Administration Act 1959 which states:

> 60 Power of personal representative to dispose of property.
>
> (3) A personal representative may charge, mortgage or otherwise dispose of all or any property vested in him, as he may think proper, subject to any restriction which may be imposed in this behalf by the will of the deceased, and subject to this section:
>
> Provided that an executor may dispose of any property notwithstanding any restriction so imposed, if he does so in accordance with an order of the court.

[22] Although not stated in their supporting affidavit, the plaintiffs in making the *ex parte* application, must have taken the view — and I believe quite rightly — that the words in the will to the effect:

... far their absolute use and benefit during their life ...

is an implied restriction imposed by the will on the executors in respect of the land, and this means that the land cannot be sold by the executors unless either:

(a) all the beneficiaries agree to the proposed sale; or

(b) in the absence of such an agreement, there is a court order approving the proposed sale.

[23] In their supporting affidavit for the ex parte application, the plaintiffs made no mention of the various documents which I have mentioned above, namely:

(a) Muniandy's and Neela's solicitors' letter of 13 June 2001 (which, inter alia, contains the allegation of fraudulent misrepresentation);

(b) the plaintiffs' solicitors' letter of 28 June 2001;

(c) Muniandy's and Neela's solicitors' letter of 10 July 2001;

(d) the statutory declaration allegedly made by the beneficiaries (except Muniandy); and

(e) the caveat lodged by Muniandy and Neela in respect of the said land.

[24] The plaintiffs' counsel, in his written submission, in opposing the present application, allege that the plaintiffs/executors had wanted to subdivide the property into equal shares among the beneficiaries but found it not possible (and to quote counsel):

due to the first defendant's trespass, encroachment and illegal activities ...

[25] However, no such allegation was made in the plaintiffs' supporting affidavit when applying for the *ex parte* order.

[26] In fact, the plaintiffs in their supporting affidavit for the *ex parte* application, made no mention at all of the wishes of the beneficiaries (whether to sell or otherwise) or of the proposed selling price. And the reason given in the affidavit for wanting to sell the property was merely:

> 7 Kami juga percaya tanpa melupuskan harta pusaka dengan menjualkan kepada bakal pembeli, pembahagian harta pusaka adalah menyusahkan dan melambatkan proses pengagihan kepada benefisiari-benefisiari.

[27] The plaintiffs did not explain in their supporting affidavit what was meant by:

... menyusahkan dan melambatkan proses pengagihan ...

[28] However, notwithstanding the dearth of information in their supporting affidavit, the plaintiffs obtained the desired *ex parte* order on 16 October 2001.

[29] Upon learning of the *ex parte* order, Neela and Muniandy promptly filed an *inter parte* application to intervene in the *ex parte* originating summons with a view to setting aside the *ex parte* order. The *inter parte* summons in chambers was filed on 30 October 2002.

[30] The application to intervene was heard and granted by the court on 8December 2003. The court ordered that the *ex parte* originating summons be converted to *inter parte* originating summons. The applicants (Balakerisnan and Saraswathy) in the original *ex parte* originating summons now became the plaintiffs in the *inter parte* originating summons; and Neela and Muniandy, now, the interveners, were made defendants in the *inter parte* originating summons proceedings.

[31] On 19 December 2003, the defendants (Neela and Muniandy) filed the present encl 31 to set aside the *ex parte* order.

[32] In seeking to set aside the *ex parte* order of 16 October 2001, the defendants/applicants contend that there were material non-disclosures on the part of the plaintiffs when they applied for the *ex parte* order.

[33] In the present case, I had granted the defendants' application to set aside the *ex parte* order with costs. In my judgment, there is merit in the defendants' contention that there had been material non-disclosures on the part of the plaintiffs. In making the *ex parte* application, the plaintiffs should have (but they did not) made full and frank disclosure; and, in particular, should have informed the court (but did not) of the following facts.

[34] First, the plaintiffs should have disclosed to the court that they had never sought the consent of Muniandy and that Muniandy had never consented to the proposed sale of the land to Bright Rims Manufacture.

[35] Second, the plaintiffs should have disclosed to the court that the defendants through their solicitors had been asking the plaintiffs (via the said two letters of 13 June 2001 and 10 July 2001, which should have been exhibited by the plaintiffs when applying for the *ex parte* order) to effect the registration of their respective shares in the land onto the land title. The non-committed reply letter of 28 June by M/s Saravanan should have also been exhibited.

[36] Third, it should have been disclosed to the court that there was in existence a statutory declaration purportedly (which the plaintiffs should have exhibited) signed by all the beneficiaries (including Neela), except Muniandy, authorising the plaintiffs to sell the land to any interested party.

[37] Fourth, the plaintiffs should have also disclosed Neela's serious allegation in the letter of 13 June 2001 that she was fraudulently induced by the plaintiffs into signing the statutory declaration.

[38] Finally, it should also be disclosed that the defendants had had lodged a private caveat in respect of the land and the reason for the lodging of the caveat.

[39] In my judgment, all the above facts are material in order for the court to make a fair decision as to whether or not the *ex parte* application ought to have been granted. The plaintiffs as executors and trustees were under both legal and moral obligations to place the whole facts before the court. After all the plaintiffs as the executors and trustees have to protect the interest of all the beneficiaries. In my judgment had the court been informed of the above facts it might not have granted the *ex parte* application. The court might either have dismissed the application or might have ordered that the application be heard on an *inter parte* basis.

[40] In *Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd* [1988] 3 All ER, Sir Nicolas Browne-Wilkinson VC said (at p 199):

> It is a basic principle applicable to all *ex parte*, applications that a party seeking *exparte* relief must make full disclosure to the court of all facts which are material to the exercise of the court's discretion whether or not to grant the relief.

[41] There is, however, another matter. The defendants had objected to the plaintiffs' affidavit of 21 January 2004 (encl 32) on the ground that the formal beginning of the affidavit does not contain the requirements of O 41 r 1(4) of the Rules of the High Court 1980 ('the RHC') in that it does not state the place of residence (or any address at all) of the deponent and it does not state whether the deponent affirmed or took an oath.

[42] The defendants in their affidavit in reply (at encl 35) of 12 February 2004 gave notice of their preliminary objection to the plaintiffs' affidavit at encl 32.

[43] On 5 April 2004 the plaintiffs' filed what purported to be a 'corrective' affidavit (encl 36A).

[44] Now, if we were to examine the plaintiffs' affidavit at encl 32, we will note that it does not contain the following usual opening statement:

> We … (names of deponents) ... of ... (residential addresses) ...do make oath (or do solemnly and sincerely affirm)

[45] The plaintiffs' affidavit instead begins simply like this:

> (Title)
>
> AFIDAVIT JAWAPAN
>
> 1 Kami adalah plaintif-plaintif seperti di atas.

[46] It will be observed that the deponents of the affidavit have omitted:

(a) to state that they have taken the oath (or have solemnly affirmed);

(b) to state their full names;

(c) to state their respective residential addresses; and

(d) to state their respective occupations (or, if none, their description).

[47] Thus, there is clear disregard for the rules of procedure. For O 41 r 1(4) of the RHC stipulates:

> (4) Every affidavit must be expressed in the first person and must state the place of residence of the deponent and his occupation or, if he has none, his description ...

[48] Practice Note No 11 of 1947 states:

> It has been observed that many affidavits are now being filed which do not comply with the provisions of r 19 of the Rules under the Courts Ordinance. (See Gazette Notification No 179 of 1919). The requirement that full name, description and place of abode and, in certain cases, father's name, nationality and age shall be stated is not merely formal. There is ample authority for the rejection of affidavits which do not comply with these requirements and it is desired to remind all concerned that documents irregular or defective on their face may be rejected when tendered for filing. The question of rejection is discretionary and it is not suggested that assistant registrars must automatically reject every affidavit which is irregular in this respect; but the rules of procedure must be followed and, particularly in any case where a defect appears to have any immediate importance, the assistant registrar should reject the document or return it for amendment and re-swearing. In the same way, an officer to whom an affidavit is produced for swearing should refuse to take it, if it is defective on its face through the absence of the required particulars.

[49] According to the *Malaysian High Court Practice* (2001) Desk Ed 1, at p 1304, para 41.1.5:

> An affidavit must commence by the deponent stating that 'I ... of ... do make oath ...' or 'I ... of ... do solemnly and sincerely affirm'.

[50] In my judgment, based on the above authorities the defects in the affidavit are serious in nature; are so fundamental. The affidavit, therefore, must be rejected.

[51] The plaintiffs, in answer to the objection, as expected, invoke O 1A and O 2 rule 3 of the RHC.

[52] Order 1A states as follows:

> ORDER 1A
>
> COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE
>
> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[53] Order 2 r 3 provides:

> 3 A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[54] With respect I do not think that the validity of the affidavit of the plaintiffs could be saved by resorting to the above provisions of the RHC. Inmy judgment, in deciding whether or not a litigant should be allowed to rely on O 1A and O 2 r 3, the court should also consider the seriousness of the defects and the conduct of the errant party regarding the defects. In particular, the court must consider the absence of the declaration 'I ... do make oath' or 'I ... do solemnly and sincerely affirm'. In my view, these words are not mere meaningless rituals but are very essential since affidavits have to be sworn or affirmed, and that the oath or affirmation had to be administered before the deponent states the averments in the affidavit. I, however, do observe that at the end of the affidavit there is the jurat containing the usual words:

> Diikrakan oleh deponen-deponen berkenaan Balakerisnan a/l Varathan dan Saraswathy a/p T Varathan di Kuala Lumpur pada 21 Januari 2004 jam 1 ptg.

[55] And the jurat was signed by the deponents before the Commissioner of Oath, who affixed his signature and seal. But having the jurat alone is not sufficient. There must be the declaration by the deponent himself as to the oath or affirmation at the beginning of the affidavit, which has always been the practice. Moreover, the jurat does not state as to when the oath or affirmation was administered. The deficiency becomes all the more serious when there are other defects as well as has been pointed out above (ie the non-compliance with r 1(4)). I agree with the submission of the defendants' counsel that the defect brought about by the absence of the oath or affirmation goes to the root or the validity of the affidavit. In this regard, I refer to an old English case, namely, *Phillips v Prentice* (1843) 2 HARE 542 which held (as exactly stated in the law report):

> An affidavit which does not express that the deponent 'made the oath' is not admissible.
>
> An affidavit commencing in this form, 'A. B., of, &c., saith that' not adding 'maketh oath' or any words of like signification, was held, on the authority of *Oliver v Price* (3 Dowl Rep. KB Pract 261), to be inadmissible, notwithstanding the jurat expressed that it was 'sworn by the said A. B., at, &c' ...

[56] The following cases also support the above proposition of law:

(1) *Oliver v Price* (1834) 2 Dowl 261;

(2) *Doe d Britton v Clarke* (1842) 12 LJQB 69;

(3) *Re Newton* (1860) 2 De GF & J 3, 3 45 ER; and

(4) *Allen v Taylor* (1870) LR 10 Eq 52.

[57] In this context, I must remark here that since the introduction of O 1A and O 2 r 3 it has come to my observation that some litigants have the tendency to regard these provisions as a licence to ignore or to treat lightly rules of procedure. This being the case, it is imperative that the court treads cautiously before excusing any non-compliance by invoking these provisions; otherwise, these provisions might be abused. In my view, the purpose behind the introduction of O 1A and O 2 r 3 is not to protect the indolent or cavalier litigants, but to afford protection to the ordinary rule-abiding litigants in a situation where the non-compliance is due to mere genuine inadvertence or oversight (and not blatant disregard) and non-prejudicial in nature; or where the non-compliance is not serious or fundamental in nature. The court has the solemn duty to ensure respect for the rules of procedure as enshrined in the Rules of the High Court. In the present case, in the light of the fundamental nature of the defects in the affidavit, in my judgment, it would be highly prejudicial and a gross injustice to the defendants if the plaintiffs' affidavit at encl 32 is allowed to stand. For, then, the court would be bending extensively the rules of procedure just to accommodate a litigant that has treated the rules of procedure with gross carelessness. This would not be fair to the defendants who had painstakingly and diligently adhered by the rules. Furthermore, the conduct of the plaintiffs vis-a-vis the defects must also be taken into account. It cannot be said that they were unaware of the defects. They had been forewarned of the defects in the affidavit by the defendants' affidavit of 12February 2004. But the plaintiffs were adamant; they took no prompt action to rectify the defects. And when the plaintiff eventually did file a so-called corrective affidavit, it was not only a much belated effort but also a halfhearted measure. It was a belated effort because it was filed way out of time on 5 April 2004. In fact it was filed after the hearing date of 2 March 2004 (but before the decision date of 18 May 2004)! And it was a halfhearted measure because the affidavit is not truly a corrective affidavit. For it merely states (I reproduce here only the pertinent portion of the affidavit)

> (3) Kami di sini dengan hormatnya pohon kebenaran merujuk kepada afidavit jawapan kami yang diikrarkan pada 21 Januari 2004.
>
> (4) Kami telah tidak memasukkan perenggan permulaan afidavit yang mengandungi butiran-butiran kami seperti nama, nombor kad pengenalan, taraf warganegara, alamat dan ikrar kami di dalam afidavit yang diikrarkan pada 21 Januari 2004.
>
> (5) Alasan kami ialah ia merupakan kesilapan tulen disebabkan silap-pandang (overlooked) semasa penyediaan afidavit yang diikrarkan pada 12 Januari 2004 dan tidak sama sekali bertujuan untuk menghina sesiapa ataupun mana-mana pihak dengan peninggalan yang dinyatakan di perenggan di alas.

[58] Once the plaintiffs' affidavit at encl 32 is discarded, the contents of the supporting affidavits of Muniandy and Neela at encls 30 and 30A, respectively,

become unrebutted and I have no reason not to accept the averments in their affidavit evidence (*Ng Hee Thong & Anor v Public Bank Bhd* [1995] 1 MLJ 281).

Application allowed with costs.

Reported by Peter Ling